Bank Negara Malaysia v Mohd Ismail & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 03-67 OF 1989
MOHAMED JEMURI CJ (BORNEO), MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
27 JANUARY 1992

Civil Procedure *— Summary judgment — Admission of liability — Breach of scholarship agreement — Offer to pay instalments so as to avoid litigation — Whether triable issue raised — Principles applied — Rules of the High Court 1980 O 14*

Contract *— Breach — Scholarship agreement — Liquidated damages — Application for summary judgment — Admission of liability in correspondence — Whether defence has raised triable issue — Estoppel — Waiver*

The appellants claimed liquidated damages in the sum of $70,000 against the first respondent and his sureties for breach of a scholarship agreement entered into by the first respondent with the appellants. In breach of his undertaking to serve the appellants for a period of ten years upon completion of his studies, the first respondent resigned a few months after having commenced employment with them. In support of their application for summary judgment, the appellants referred to three letters written by the first respondent. Two letters, in particular, each contained an unequivocal admission of liability for breach of the agreement. In reply, the respondents claimed that the appellants had breached a condition of the agreement to provide the first respondent with a post consistent with his qualifications and that therefore the first respondent's undertaking to serve the appellants was extinguished. It was averred that the sum of $70,000 was a penalty, and the questions of waiver and estoppel were also raised as triable issues. The senior assistant registrar was satisfied on the affidavit evidence that there was no triable issue and accordingly entered judgment against the respondents. On appeal, the High Court judge set aside the order of the registrar and issued a certificate of no further argument. The appellants appealed.

Held, by a majority, allowing the appeal (Gunn Chit Tuan SCJ dissenting):

(1) In an application under O 14, the court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. A complete defence need not be shown. The defence set up need only show that there is a triable issue.

(2) Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute

is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application.

(3) Where the issue raised is solely a question of law without reference to any fact or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'.

(4) The learned judge erred in law in taking the assertion of the first respondent regarding the unsuitability of the post offered to him by the appellants as a triable issue on affidavit evidence, having regard to the unequivocal admission of liability by the first respondent under the scholarship agreement to pay the appellants $70,000 for breach of contract. Liability was admitted without qualification and only the mode of payment was in dispute.

(5) On the facts and circumstances of this case, the issue of estoppel and waiver ought to have been rejected. There was obviously no triable issue either on estoppel or waiver. The learned judge ought to have resolved the assertion on estoppel, based on the uncomplicated facts and the law, without sending it for trial.

(6) The learned judge had erred in law in not exercising his discretion judicially under O 14 by accepting uncritically the assertions of the scholar made on behalf of all the respondents, although they were equivocal, lacking in precision as well as inconsistent with undisputed contemporary documents.

(Per Gunn Chit Tuan SCJ, dissenting):

(1) When an O 14 appeal has been heard by a lower court, the appellate court should not interfere with the decision unless special circumstances are shown. In this case no special circumstances have been shown and the learned judge was right in holding that the issues raised ought to be tried and that the appellants were not entitled to obtain summary judgment.

(2) This was not an uncontested case and it was not uncontestable. The respondents have reasonable grounds for setting up a bona fide defence. Although it might be argued that the defence is not likely to succeed, the respondents should not be shut out from laying their defence and there are reasons why there ought to be a trial.

[Bahasa Malaysia summary

Perayu menuntut ganti rugi jumlah tertentu berjumlah $70,000 terhadap penentang pertama dan penjaminnya kerana kemungkiran

perjanjian biasiswa yang diikat oleh penentang pertama dengan perayu. Dalam memungkiri akujanjinya untuk bekerja dengan perayu selama sepuluh tahun selepas pelajarannya tamat, penentang pertama telah meletak jawatan beberapa bulan selepas bermula bekerja dengan mereka. Dalam menyokong permohonan mereka untuk penghakiman terus, perayu merujuk kepada tiga pucuk surat yang ditulis oleh penentang pertama. Dua pucuk surat, khasnya, masing-masing mengandungi pengakuan yang sama sekali tidak meragukan akan liabiliti penentang pertama tentang kemungkiran perjanjian. Dalam jawapannya, penentang mendakwa bahawa perayu telah melanggar syarat perjanjian untuk memberi penentang pertama satu jawatan yang bersesuaian dengan kelayakannya dan oleh kerana itu akujanji penentang pertama untuk bekerja dengan perayu telah terhapus. Telah didakwa bahawa jumlah wang $70,000 adalah suatu penalti dan soal pelepasan dan estopel juga telah didirikan sebagai isu yang boleh dibicarakan. Penolong kanan pendaftar telah berpuashati dengan keterangan afidavit bahawa tiada isu yang boleh dibicarakan dan dengan itu mencatatkan penghakiman terhadap penentang. Atas rayuan, hakim Mahkamah Tinggi telah mengetepikan perintah pendaftar itu dan mengeluarkan perakuan bahawa hujah lanjut tidak diperlukan. Perayu telah membuat rayuan.

Diputuskan, dengan majoriti, membenarkan rayuan itu (Gunn Chit Tuan HMA menentang):

(1) Di dalam suatu permohonan di bawah A 14, mahkamah hendaklah berpuashati dengan keterangan afidavit bahawa pembela telah menimbulkan bukan sahaja suatu isu tetapi suatu isu yang boleh dibicarakan. Keputusan sama ada suatu isu boleh dibicarakan atau tidak bergantung kepada fakta atau undang-undang yang timbul daripada setiap kes seperti yang didedahkan di dalam keterangan afidavit yang dikemukakan di hadapan mahkamah. Pembelaan yang sepenuhnya tidak semestinya dikemukakan. Pembelaan yang didirikan cuma perlu mengemukakan satu isu yang boleh dibicarakan.

(2) Di dalam suatu permohonan di bawah A 14, tugas seseorang hakim tidak tamat selepas sahaja suatu fakta ditegaskan oleh suatu pihak dan dinafikan atau dipertikaikan oleh pihak yang lain dalam suatu afidavit. Apabila penegasan, penafian atau pertikaian sedemikian meragukan, atau kurang tepat atau bercanggah dengan dokumen semasa yang tidak dipertikaikan atau kenyataan lain oleh deponen yang sama, atau adalah jelas tidak mungkin benar dengan sendirinya, maka hakim mempunyai kewajipan menolak penegasan atau penafian tersebut dan dengan itu menjadikan isu itu tidak perlu dibicarakan. Melainkan prinsip ini dipatuhi, seseorang hakim tidak akan berkedudukan untuk menggunakan budi bicaranya secara adil dan bijaksana di dalam permohonan di bawah A 14.

(3) Di mana isu yang timbul adalah hanya persoalan undang-undang tanpa rujukan kepada apa-apa fakta atau di mana fakta adalah

jelas dan tidak dipertikaikan, mahkamah patut menjalankan kewajipannya di bawah A 14. Jika perkara undang-undang itu difahami dan mahkamah yakin yang ia tidak boleh diperdebatkan, mahkamah tidak dilarang daripada memberikan suatu penghakiman terus semata-mata kerana persoalan undang-undang itu pada pandangan pertama adalah agak kompleks dan kerana itu memakan masa yang lebih sedikit untuk difahami.

(4) Di dalam kes ini hakim yang arif telah tersilap dari segi undang-undang dalam mengambil penegasan penentang pertama mengenai ketidaksesuaian jawatan yang ditawarkan kepadanya oleh perayu sebagai isu yang boleh dibicarakan mengikut keterangan afidavit, memandangkan pengakuan liabiliti penentang pertama yang sama sekali tidak meragukan di bawah perjanjian biasiswa itu untuk membayar $70,000 kerana kemungkiran kontrak. Liabiliti telah diakui tanpa syarat dan hanya cara pembayaran sahaja yang dipertikaikan.

(5) Mengikut fakta dan keadaan kes ini, isu berkenaan estopel dan pelepasan seharusnya ditolak. Jelaslah tidak ada isu yang boleh dibicarakan mengenai estopel atau pelepasan. Hakim yang arif sepatutnya menyelesaikan penegasan mengenai estopel, berdasarkan fakta yang tidak rumit dan undang-undang, tanpa menghantarnya untuk perbicaraan.

(6) Hakim yang arif telah tersilap di sisi undang-undang dengan tidak menggunakan budi bicaranya dengan adil dan bijaksana di bawah A 14 apabila beliau menerima dengan begitu sahaja penegasan penerima biasiswa itu bagi pihak semua penentang, sungguhpun penegasan itu adalah tidak tentu, kurang tepat dan bercanggah dengan dokumen semasa yang tidak dpertikaikan.

(Menurut Gunn Chit Tuan HMA, menentang):

(1) Apabila suatu rayuan di bawah A 14 telah diputuskan oleh mahkamah rendah, mahkamah rayuan tidak harus mengganggu keputusan itu, melainkan keadaan istimewa ditunjukkan. Di dalam kes ini keadaan istimewa tidak ditunjukkan dan hakim yang arif adalah betul dalam memutuskan bahawa isu yang ditimbulkan perlu dibicarakan dan bahawa perayu tidak berhak mendapat penghakiman terus.

(2) Ini bukanlah kes yang tidak dicabar dan ia bukanlah kes yang tidak boleh dicabar. Penentang mempunyai alasan yang munasabah untuk mendirikan pembelaan yang bona fide. Sungguhpun boleh dihujahkan bahawa pembelaan itu tidak mungkin berjaya, penentang tidak harus dicegah daripada mengemukakan pembelaan mereka dan memang ada sebab mengapa perbicaraan perlu diadakan.]

Notes

For cases on summary judgment, see 2 *Mallal's Digest* (4th Ed) paras 2178–2296. For cases on breach of contract, see 3 *Mallal's Digest* (4th Ed) paras 829–870.

Cases referred to

1 *Anglo–Italian Bank v Wells* (1878) 38 LT 197 (refd)
2 *Ooi Boon Leong & Ors v Citibank NA* [1984] 1 MLJ 222 (refd)
3 *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 (refd)
4 *Blaiberg v Abrams* (1910) 77 LTJ 255 (refd)
5 *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (folld)
6 *Cow v Casey* [1949] 1 All ER 197 (folld)
7 *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 (folld)
8 *Government of Malaysia v Adnan bin Awang & Ors* [1980] 2 MLJ 291 (refd)
9 *Payana Reena Saminathan & Anor v Pana Lana Palaniappa* [1914] AC 618 (refd)
10 *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 (folld)
11 *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd* [1987] 2 MLJ 332 (folld)
12 *Jacobs v Booth's Distillery Co* (1901) 85 Lt 262 (folld)
13 *Manger v Cash* (1889) 5 TLR 271 (folld)
14 *Miles v Bull* [1969] 1 QB 258; [1968] 3 All ER 632 (refd)
15 *Ford v Harvey* (1893) 9 TLR 328 (refd)
16 *Lloyds Banking Co v Ogle* (1876) 1 Ex D 263 (refd)
17 *United Malayan Banking Corp Ltd v Ipoh Mining Co (M) Ltd* [1964] MLJ 69 (folld)
18 *Ho Chooi Soon v The Indian Overseas Bank Ltd* [1961] MLJ 86 (refd)
19 *Wing v Thurlow* (1893) 10 TLR 151 (refd)

Legislation referred to

Contracts Act 1950 s 63
Rules of the High Court 1980 O 14, 81

Appeal from: Suit No P24–490–86 (High Court, Kuala Lumpur)

CV Das and *John Mathew* (*Shook Lin & Bok*) for the plaintiffs/appellants.
Joseph Yeo (*Anis Mohd Ismail & Co*) for the defendants/respondents.

Mohamed Azmi SCJ (delivering the majority judgment of the court): This appeal concerned a claim by Bank Negara Malaysia ['the bank'] for liquidated damages in the sum of $70,000 (ringgit seventy thousand only) for breach of a scholarship agreement entered into on 21 July 1980 between the bank and the scholar, the first respondent with the second and third respondents as guarantors. In an application for summary judgment under O 14 of the Rules of the High Court 1980, the senior assistant registrar was satisfied on the affidavit evidence that there was no triable issue and accordingly entered judgment against the three respondents on 24 August 1988. On an appeal to a judge-in-chambers, the learned judge set aside the

order of the registrar and issued a certificate of no further argument. On further appeal by the bank, we restored the order of the senior assistant registrar by a majority decision (Gunn Chit Tuan SCJ dissenting).

At the conclusion of the appeal, we indicated that we would give our reasons and we do so now.

From the scholarship agreement, there was no dispute that it was the scholar, the first defendant in the court below, who approached the bank for a grant of scholarship to enable him to pursue a course of study in the University of Malaya leading to the award of an honours degree in Law. The bank agreed to grant the scholarship upon the terms and conditions contained in the agreement. One of these conditions which formed the consideration for the grant of the scholarship, was contained in cl 1(c) of the agreement which provided:

> The scholar with the approval and consent of the sureties, hereby agrees:
> ...
> (c) that he will upon being required to do so by the bank serve the bank or any Ministry or body (whether corporate or unincorporate) that may be so determined by the bank in a post consistent with the qualifications obtained by the scholar to which he may be appointed for a period of ten (10) years from the date of his appointment upon the terms and conditions for the time being usually applicable to such post and at a salary in accordance with the scales of salaries for the time being in force relating thereto.

This was followed by cl 3(e) in which the scholar agreed:

> in the event of the scholar leaving the service of the bank or the Ministry or body (whether corporate or unincorporate) that the scholar may be required by the bank to serve before fulfilling his obligation under this agreement to serve the bank or the Ministry or body (whether corporate or unincorporate) for a period of ten (10) years the scholar and the sureties shall be jointly and severally liable for themselves, their heirs, executors, administrators and assigns to pay to the bank on demand by way of liquidated damages the sum of dollars seventy thousand only ($70,000).

In support of the application for summary judgment, Encik Nordin Haji Nasir, the personnel manager of the bank in his affidavit sworn on 18 January 1988 affirmed, inter alia, that:

> 4 By the said agreement and in consideration of the plaintiff granting him a scholarship to pursue a course of study the first defendant, inter alia, undertook to serve the plaintiff for a period of ten years upon completion of the said studies.
> 5 In breach of the said agreement the first defendant left the service of the plaintiff without completing the ten years as agreed.
> 6 In response to demands from the plaintiff and/or its solicitors the first defendant, inter alia, admitted to the plaintiff's claims. There is now shown before me a letter of admission and marked as exh 'BNM-2'.

There were three letters written by the scholar which were relevant to the issue of admission of liability. The first letter with the address of the scholar given as 'Jabatan Pengawalan Bank, Bank Negara Malaysia' was the resignation letter dated 3 October 1984 as follows:

Tuan,

Perletakan Jawatan sebagai Pegawai Pentadbiran

Berhubung dengan perkara di atas, dengan ini saya memberi notis 1 (satu) bulan, seperti yang dikehendaki dalam surat lantikan saya bertarikh 13 Julai 1984 (Bilangan: Est 200), meletakkan jawatan sebagai pegawai pentadbiran di Bank Negara Malaysia.

2 Sebagai bekas pemegang biasiswa Bank Negara, saya akui bahawa saya tertakluk dengan syarat-syarat perjanjian biasiswa yang ditandatangani oleh saya dengan Bank Negara pada 21 Julai 1980 yang mana saya dikehendaki membayar $70,000 kepada pihak bank sekiranya saya meninggalkan bank sebelum habis tempoh perkhidmatan 10 tahun.

3 Sekiranya saya memulakan perkhidmatan di pekerjaan lain, saya berjanji untuk membayar balik jumlah $70,000 ini secara ansuran dalam tempoh 15 tahun, menurut kadar yang berpatutan yang ditetapkan oleh Bank Negara.

4 Saya juga faham bahawa surat pemberian notis sebulan perletakan jawatan ini dianggap berkuatkuasa selepas tempoh tersebut sekiranya saya tidak mengemukakan surat menarik balik keputusan ini.

Sekian, terima kasih.
Yang benar,
tt
(Mohd Ismail Ali Johor)

In the second letter dated 14 December 1984, the scholar referred to his letter of resignation where he had requested for 15 years within which to pay the bank the $70,000 in liquidated damages. After being informed that the request had been turned down, he wrote the second letter to the bank to allow him to pay within eight years instead of 15 years.

Exhibit 'BNM-2' was the third letter written by the scholar dated 24 December 1985 and it contained an unequivocal admission of liability for breach of the scholarship agreement. The scholar reiterated his request to pay the agreed liquidated damages by instalments. The letter addressed to the solicitor of the bank and copied to the guarantors is set out below:

Dear Sir,

Re: Breach of scholarship agreement

The abovementioned matter and your demand letter dated 10 December 1985 refers.

I would like to inform you and your clients that I was just admitted to the Malaysian Bar on 24 August 1985 and now I am only working as a legal assistant in a legal firm. Hence, my income are [sic] fixed and it is really impossible for me to raise the said sum of $70,000 within fourteen (14) days or even years in lump sum.

By virtue of the above and the state of financial difficulties I am at present, I humbly request and shall appreciate if your clients could accept my proposal to pay the sum of $70,000 by way of monthly instalment[s] to commence immediately in the following manner:

(1) $400 × 12 = $ 4,800
(2) $500 × 12 = $ 6,000
(3) $600 × 24 = $14,400
(4) $700 × 64 = $44,800

Total: $70,000

As I am very new to this practising world, I hope you and your clients would appreciate that legal proceedings may certainly affect my prospects. Most certainly should execution proceedings be levied for the lump sum it may halt my career which will not benefit anyone.

While I was working with your clients, I found that there was no post for legal officer and the post that was given to me was only as an administrative officer and your clients day by day give [sic] me hope that they are going to set up a legal department. However, as I waited patiently there were [sic] not even a proposal to set up such department and as such my knowledge accumulated would have been of no avail. Due to this I decided to put to good use of my qualifications and join the private sector as legal assistant.

Nevertheless I do not wish, to evade liability but satisfy your clients' claim within my means.

I sincerely hope you can convey my proposal to your clients and urge them to accept the same or if my proposal is not acceptable I will be grateful to receive a reasonable counter-proposal from your end.

Thanking you.

Yours sincerely,
tt
cc: Guarantors

In his written judgment, the learned judge delved into the principles to be applied in O 14 applications and referred to the case of *Anglo-Italian Bank v Wells*[1] for the proposition that 'when the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give judgment for the plaintiff'. Apparently the learned judge found some difficulties in the application of the words 'no fairly arguable point to be argued', and he attempted to formulate some sort of definition for those words. He then referred to the Privy Council case of *Ooi Boon Leong & Ors v Citibank NA*,[2] for the proposition that if the defence can raise serious questions in law or fact to resist the plaintiffs' claim, summary proceedings under O 14 are deemed inappropriate. According to the learned judge, it has been said that even though the defendants may not be able to pin-point any precise 'issue or question in dispute which ought to be tried', but nevertheless if it is apparent to the court that for some other reason there ought to be a trial, judgment should not be given under O 14. It seemed to us that this last statement might have been drawn from the judgment in *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd*,[3] where Lee Hun Hoe CJ in dealing with summary jurisdiction conferred by O 81 had this to say at p 390:

> A defendant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some reason there ought to be a trial.

The learned judge also referred to the statement of Bowen LJ in *Blaiberg v Abrams*[4] for the proposition that although the court was not bound to require documentary evidence from the plaintiff, however, if he elected to produce one in an affidavit to support his application or in an affidavit in reply, then the court was bound to look at all the circumstances before deciding whether the defence set up is a bona fide defence.

In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v Letchumanan*[5] had this to say at p 217:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.

Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See *Cow v Casey*[6] and *European Asian Bank AG v Punjab & Sind Bank*[7] at p 516.)

The fundamental question in this appeal was whether the learned judge had applied the principles to which we had alluded, to the facts and circumstances of the present case. The learned judge identified the first issue to be the failure of the appellant bank to appoint the scholar in a post consistent with his legal qualification. In the memorandum of appeal, the appellant bank contended that the learned judge erred in law in regard to the scholar's defence that it was a condition precedent under the scholarship agreement that the scholar should be given a post consistent with the

qualifications obtained by him and that the appellants' alleged breach of it extinguished his obligations under the agreement. Based on the scholar's letter of resignation dated 3 October 1984 and the other two letters of admission of liability to pay $70,000 damages, it was clear that his present assertion on the issue of liability was absolutely inconsistent with the three undisputed contemporary documents. His assertion that the post given to him was inconsistent with his legal qualification was also equivocal and lacking in precision having regard to the obvious fact that he knew or ought to know when he entered into the scholarship agreement that at all material times the appellants were engaged in the business of central banking and not the business of a legal firm. On completion of his law studies, the scholar was attached to 'the Bank Regulations Department whose function was to administer all legislation relating to banks'. The scholar construed the post as merely administrative since the appellants had not set up their own legal department. To him the post was inconsistent with his qualification. The learned counsel for the appellants argued that whether the post was or was not consistent with his legal qualification was a subjective question. We would say that being employed for only four months after graduation, it would be presumptuous for any new law graduate to suggest that working in the regulations department of the bank was completely out of place with his first degree law qualification. Be that as it may, the complaint regarding unsuitability of the post though mentioned in the third letter, was never raised as a basis for extinguishing his liability in any of the three contemporaneous letters written by the scholar. We therefore held the view that the learned judge erred in law in taking the assertion as a triable issue on affidavit evidence, having regard to the unequivocal admission of liability under the scholarship agreement to pay the appellants $70,000 for breach of contract. Liability was admitted without qualification, and only the mode of payment was in dispute.

The second issue identified by the learned judge was said to be one of estoppel which allegedly involved both questions of law and fact. The learned judge entertained the scholar's assertion that the appellant bank was estopped from instituting the suit since it had in September 1986 agreed not to take any action against him if he consented to serve as a legal officer in the Attorney General's chambers. Regretfully, we could not find any evidence to support such an undertaking by the bank to relieve the scholar from liability under the scholarship agreement, although the party to benefit from the contract may change, as envisaged in cl 1(c) and (e). The alleged estoppel arose from a letter written by the appellant bank dated 22 September 1986 to the Attorney General and copied to the scholar. The letter reads:

> Tuan,
>
> Permohonan berkhidmat dengan Jabatan Peguam Negara — Encik Mohd Ismail bin Ali Johor
>
> Dengan hormat, saya merujuk kepada permohonan Encik Mohd Ismail bin Ali Johor (bekas kakitangan Bank Negara Malaysia) bertarikh 15 September 1986, dan dengan ini mengesahkan bahawa pihak Bank Negara Malaysia bersetuju

memindahkan perjanjian perkhidmatan beliau kepada Jabatan Peguam Negara. Pemindahan ini tertakluk kepada Encik Mohd Ismail berkhidmat dengan Jabatan Peguam Negara selama tempoh kontrek beliau.

Sekian dimaklumkan.

Yang benar,
tt
(Sharifah Mariah Alfah)
Pengurus,
Bahagian Personel.

The learned judge rightly reminded himself that this letter was sent in September 1984, ie before the scholar put in his resignation letter of 3 October 1984. But what his Lordship had apparently failed to appreciate was that if the scholar had been successful in his application for a post in the Attorney General's department, there would have been a novation or assignment of the scholarship agreement, and the scholar would then have been obliged to work in the Attorney General's department for the balance of the ten years. However, it was an undisputed fact that the scholar's application was rejected by the relevant service commission and he never got the job in the Attorney General's department.

On the admitted facts we failed to see how there could be estoppel by conduct. The contingency or condition precedent to which the appellant bank had agreed to release the scholar's services in favour of the Attorney General's department had not occurred notwithstanding the fact that the scholar only came to know officially of the rejection on 6 October 1987, ie about three years after he had put in his resignation letter. If the affidavit evidence had been critically analysed, it would be plain to conclude that the appellant bank would have no choice but to withdraw the present suit filed on 13 December 1986, if the intended novation or assignment of the scholarship agreement had gone through. On the basis of the bank's letter dated 22 September 1986, for any novation or assignment of right to be effective, the scholar must first be employed by the Attorney General's department. But unfortunately for the scholar, this did not materialize. On the facts and circumstances of this case, we were of the opinion that the issue of estoppel ought to have been rejected having regard to the facts and circumstances of the case. The learned judge ought to have resolved the assertion on estoppel, based on the uncomplicated facts and the law, without sending it for trial. For similar reasons we were also not impressed with the new argument on waiver by the learned counsel of the respondents. What the learned counsel termed as waiver was in actual fact a contingency agreement on novation or assignment of right, and for reasons already stated, the scholar could not possibly bring himself within either s 63 of the Contracts Act 1950 (see *Government of Malaysia v Adnan bin Awang & Ors*[8]) or the common law principle as enunciated in *Payana Reena Saminathan & Anor v Pana Lana Palaniappa*[9] at p 622. There was obviously no triable issue either on estoppel or waiver.

It is unfortunate that the issue of estoppel which in our view was a red herring, had clouded his Lordship's decision on the importance of the three

letters which separately and cumulatively contained a clear admission of liability by the scholar to pay the appellant bank $70,000 as liquidated damages for breach of the scholarship agreement. His Lordship was of the opinion that even assuming any of the letters to be admission of liability, it would still be debatable whether or not the appellant bank was precluded from relying on the admission by reason of the alleged estoppel by subsequent conduct. As a matter of law we must disagree, having regard to the clear absence of triable issue on estoppel.

In our opinion the learned judge had erred in law in not exercising his discretion judicially under O 14 by accepting uncritically the assertions of the scholar made on behalf of all the respondents, although they were equivocal, lacking in precision as well as inconsistent with undisputed contemporary documents. In the event, this court was entitled to hear full argument on the legal points and exercised its power to grant summary judgment under O 14 to the appellants instead of sending it back to the High Court.

We had therefore allowed this appeal by setting aside the order of the High Court and restoring the original order of the senior assistant registrar. At our request, learned counsel for the appellants agreed to advise his clients to allow the respondents to pay the judgment sum by instalments to alleviate his financial difficulties in meeting his liabilities under the scholarship agreement. We also ordered each party to pay its costs in this appeal.

Gunn Chit Tuan SCJ (dissenting): Bank Negara Malaysia (hereinafter referred to as 'the appellants') had instituted an action against one Mohd Ismail bin Ali Johor and two others (hereinafter referred to as 'the respondents'). In a statement of claim dated 13 December 1986, it was alleged that by an agreement in writing dated 21 July 1980, in consideration of the appellant granting the said Mohd Ismail bin Ali Johor a scholarship to pursue a course of study in the University of Malaya leading to the award of an honours degree in Law, the first respondent undertook to serve the appellants for a period of ten years upon completion of his studies, failing which he would pay the appellants liquidated damages of $70,000. It was also alleged that the first respondent, having commenced serving the appellants on 1 June 1984, left on 3 November 1984 in breach of the said agreement. The other two respondents were sued in their capacity as guarantors for the due performance of the said agreement.

In a joint statement of defence, the respondents claimed that the appellants had breached a condition of the agreement by failing to provide the first respondent with a post consistent with the qualification obtained by him and that the obligation of the first respondent to serve the appellants under the said agreement was extinguished. It was also averred that, in any event, the sum of $70,000 was a penalty claim which was time-barred as the action was filed after the expiry of one year from the date of the breach. In the further alternative, it was averred that the appellants had waived their right under the agreement as they had entered into a new agreement with the respondents whereby they agreed not to claim the said sum of $70,000 in the event that the first respondent was prepared to work in the Attorney

General's chambers. The first respondent accepted that offer when he applied to the Attorney General's chambers for a post on 15 September 1986. He attended several interviews but was not successful when he received a letter dated 6 October 1987 from the Attorney General's chambers. It was contended that at any rate the appellants were estopped from claiming against the respondents.

On 18 January 1988, the appellants applied under O 14 of the Rules of the High Court 1980, for summary judgment and not under O 27 of the said rules for judgment on admission. In an affidavit in support affirmed by the personnel manager of the appellants, it was asserted that in response to demands from the appellants, the first respondent admitted the appellants' claim and a letter written by the first respondent dated 24 December 1985 was annexed to the said affidavit to show the extent of the admission. The first respondent filed an affidavit in reply and produced some contemporaneous letters to support the claims made by him in the joint statement of defence. The second respondent also filed an affidavit to oppose the appellants' application. In addition to adopting the points raised by the first respondent, the second respondent also stated that the appellants had varied the agreement by increasing the scholarship grants without the knowledge and consent of both guarantors who were therefore discharged from their obligations.

In answer to the first respondent's claims, the appellants filed another affidavit exhibiting a letter written by the first respondent on 14 December 1984 which the appellants claimed amounted to an admission on the part of the first respondent regarding his breach of the agreement, and an offer made to pay the sum of $70,000 by monthly instalments. Lim Beng Choon J who heard this application in the High Court at Kuala Lumpur, cited Jessel MR in *Anglo-Italian Bank v Wells*[1] that 'when the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff'. The learned judge, however, stressed that the important words were 'no fairly arguable point to be argued', and stated, after referring to the Privy Council case of *Ooi Boon Leong & Ors v Citibank NA*[2] that if the defence can raise serious questions on law or fact to resist the plaintiffs' claim, summary proceedings under O 14 were not appropriate. His Lordship also pointed out that even if a defendant may not be able to pin-point any precise issue or question in dispute which ought to be tried but nevertheless if it is apparent to the court that there ought for some other reason to be a trial on that claim, judgment should not be given under O 14. Lastly, the learned judge referred to *Blaiberg v Abrams*,[4] in which Bowen LJ stated that 'in deciding whether the defence set up is a real defence or not, all the circumstances must be looked at'.

Applying the principles enunciated in the cases referred to by him, the learned judge noted that the first issue raised by the defence was that since the appellants had failed to appoint the first respondent to a post which was consistent with his legal qualifications, they had breached the following terms of the agreement:

> 1(c) that he will upon being required to do so by the bank serve the bank or any Ministry or body (whether corporate or unincorporate) that may be so

determined by the bank in a post consistent with the qualifications obtained by the scholar to which he may be appointed for a period of ten (10) years from the date of his appointment upon the terms and conditions for the time being usually applicable to such post and at a salary in accordance with the scales of salaries for the time being in force relating thereto.

...

3(d) that upon his being appointed in accordance with cl 1(c) above, to a post consistent with the qualifications obtained by him, the scholar undertakes upon being so required to do by the bank to provide a fidelity bond or other appropriate guarantee for his continued service with the bank or the Ministry or body (whether corporate or unincorporate) that the scholar may be required by the bank to serve for a period of ten (10) years such bond or guarantee providing inter alia against:

(i) his resignation or leaving the service in breach with this agreement; or

(ii) his dismissal for misconduct including negligence or indifference to his studies under this agreement; or

(iii) his refusal to serve in any post, appropriate to his qualifications and the exigencies of the service, to which he is appointed.

The first respondent also produced the letter written by him to the Attorney General dated 15 September 1985, wherein it was stated, inter alia, that 'Sebelum saya berkhidmat dengan firma guaman tersebut saya pernah berkhidmat sebagai pegawai pentadbiran selama empat (4) bulan di Bank Negara Malaysia, Kuala Lumpur.'

The learned judge also observed that in a letter written by the first respondent on 24 December 1985, it is stated that:

> While I was working with your clients, I found that there was no post for legal officer and the post that was given to me was only as an administrative officer and your clients day by day give [sic] me hope that they are going to set up a legal department. However, as I waited patiently there were [sic] not even a proposal to set up such department and as such my knowledge accumulated would have been of no avail. Due to this I decided to put to good use of my qualifications and join the private sector as legal assistant.

That first issue could only, in the learned judge's opinion, be resolved at a trial proper.

The second issue involved the first respondent's claim that the appellants were estopped from instituting the suit as it had in September 1986 agreed not to take any action against the first respondent if he consented to serve as a legal officer in the Jabatan Peguam Negara. In support of his claim, the first respondent exhibited a letter written by the appellants dated 22 September 1986 to the Attorney General and copied to the first respondent, in which it was stated as follows:

> Tuan,
>
> Permohonan berkhidmat dengan Jabatan Peguam Negara Encik Mohd Ismail bin Ali Johor
>
> Dengan hormat, saya merujuk kepada permohonan Encik Mohd Ismail bin Ali Johor (bekas kakitangan Bank Negara Malaysia) bertarikh 15 September 1986, dan dengan ini mengesahkan bahawa pihak Bank Negara Malaysia bersetuju memindahkan perjanjian perkhidmatan beliau kepada Jabatan Peguam Negara.

Pemindahan ini tertakluk kepada Encik Mohd Ismail berkhidmat dengan Jabatan Peguam Negara selama tempoh kontrek beliau.

Sekian dimaklumkan.

Yang benar,
(Sharifah Mariah Alfah)
Pengurus,
Bahagian Personel.

The learned judge considered that as the appellants' cause of action was based on the breach of the agreement, when the first respondent left their service on 3 November 1984, the above letter might support his allegation of estoppel as the first respondent, relying on that representation, had applied for a post of legal officer in the Jabatan Peguam Negara. His Lordship again considered that that was a triable issue because it was necessary to find out why the appellants wrote the said letter and what the legal effect of the representation made in it was. For the reasons stated in his grounds of judgment, the learned judge was satisfied that the appellants were not entitled to obtain summary judgment under O 14 and therefore allowed the appeal of the first respondent against the order of the senior assistant registrar in granting judgment to the appellants.

I would, with respect, agree that the first issue which ought to be tried is whether the appellants, as alleged by the respondents in their joint statement of defence, had breached a condition of the said agreement by failing to provide the first respondent with a post consistent with the qualifications obtained by him, and that the obligation of the first respondent to serve the appellants under the said agreement had therefore been extinguished. There is then also the issue as to whether the action of the appellants was time-barred when it was instituted against the respondents. Again I would agree that yet another issue to be tried is whether the appellants had waived their right under the said agreement as they had, as alleged by the respondents, entered into a new agreement with the first respondent and were therefore estopped from claiming against the respondents. All these issues ought, as considered by the learned judge with whom I agreed, to be tried and decided at a proper trial.

The scope of O 14 proceedings meant for cases which are virtually uncontested or uncontestable is now determined by the Rules of the High Court 1980. Generally where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases (*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd*;[10] *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd*[11]). It was held in the well-known House of Lords' case of *Jacobs v Booth's Distillery Co*[12] that a complete defence need not be shown. The defence need only show that there is a triable issue or question or that for some other reason there ought to be a trial, and leave to defend ought to be given. In fact, even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given (*Manger v Cash*[13]).

The words used in the present O 14 r 3(1) that the defendant should have leave to defend if he satisfies the court 'that there ought for some other reason to be a trial' of the claim are wider in their scope than the former O 14 r 1 which provided that the defendant should have leave to defend if he 'shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally'. It was stated by Megarry J in *Miles v Bull*[14] that it sometimes happens that the defendant may not be able to pin-point any precise 'issue or question in dispute which ought to be tried', nevertheless, it is apparent that for some other reason there ought to be a trial, eg where a question of fact as to whether the plaintiff has fulfilled his part of the contract (*Ford v Harvey*[15]) or against a surety where there is a reasonable doubt of his liability (*Lloyds Banking Co v Ogle*[16]).

Moreover, when an O 14 appeal has been heard by a lower court, the appellate court would not interfere with the decision unless special circumstances are shown (see *United Malayan Banking Corp Ltd v Ipoh Mining Co (M) Ltd*[17]). In that case, the former Federal Court followed its decision in *Ho Chooi Soon v The Indian Overseas Bank Ltd*[18] and the old English case of *Wing v Thurlow.*[19] In the present case, I was unable to detect any special circumstances and I was of the view that Lim Beng Choon J was right in holding that the issues referred to above ought to be tried and that the appellants were not entitled to obtain summary judgment under O 14.

Further, reference might be made to the decision of this court in *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd,*[3] where in a judgment delivered by Lee Hun Hoe CJ (Borneo) (as he then was), it was held, inter alia, that summary jurisdiction conferred by O 81, which provides a procedure similar to O 14, must be used with great care. In that case, the defence had alleged not only variation but also estoppel and in view of that it could not be said that liability for breach of contract had been clearly established and that unconditional leave to defend should be given.

This was not an uncontested case and in my view it was not uncontestable. The respondents have reasonable grounds for setting up a bona fide defence although it might be argued that the defence is not likely to succeed. However, the respondents should not be shut out from laying their defence and there are reasons why there ought to be a trial. In all the circumstances of this case, I would therefore dismiss the appeal with costs.

Appeal allowed.

Reported by Prof Ahmad Ibrahim